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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 365

THE ASSOCIATED PRESS, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD.

BRIEF OF ARTHUR MARKEL, DEPUTY PRESIDENT OF COMMERCIAL TELEGRAPHERS' UNION, ON BEHALF OF COMMERCIAL TELEGRAPHERS' UNION, AS AMICUS CURIAE

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To the Honorable, the Chief Justice and the Associated Justices of the Supreme Court of the United States:

Arthur Markel, Deputy President of the Commercial Telegraphers' Union (a constituent body of the American Federation of Labor), on behalf of the Commercial Telegraphers' Union, files this brief because the questions involved in this case are of great importance to that Union, to other labor unions and to all persons engaged in Interstate Commerce.

The Commercial Telegraphers' Union has a membership of approximately 4,500, most of whom are engaged in the transmission of news and other data in interstate commerce. Two employers of its members, the leading telegraph companies, have been held by this Court to be engaged in Interstate Commerce, and have been regulated by Congress since the Act of June 18, 1910, C. 309, 36 Stat. 545, bringing telegraph companies under the Act to Regu-

late Commerce and under the administrative control of the Interstate Commerce Commission.

Western Union Telegraph Company v. Boegli (251 U. S. 315).

Other members of the Commercial Telegraphers' Union are engaged in the "Traffic Department" of the petitioner and of the other press services in the transmission of news throughout the states.

QUESTION INVOLVED

The broad question involved is whether Congress admittedly having the right to protect employees engaged in Interstate Commerce in their right to collective bargaining can make such collective bargaining a reality by compelling the employer to recognize representatives chosen by a majority of the employees.

THE NATIONAL LABOR RELATIONS ACT IS NECESSARY TO PROTECT EMPLOYEES IN INTERSTATE COMMERCE IN THEIR RIGHT TO COLLECTIVE BARGAINING.

There should be no question here as to the applicability of the commerce clause to the petitioner. The National Labor Relations Board found, upon competent evidence, that Morris Watson and the other editorial employees of petitioner at its New York office were directly engaged in interstate and foreign commerce by directing, facilitating and making possible the flow of news from place to place throughout this country and other countries; and any interference with or cessation of such activities would hamper, impede, and interfere with such commerce (R. 616).

The transmission of news by petitioner across state lines is no different than the broadcasting of radio programs, which was held to be interstate commerce in Fisher's Blend Station v. Tax Commission (80 L. ed. Adv. Ops. 615), decided March 30, 1936.

Nor is there any substantial issue as to the power of Congress to protect the liberty of employees in their choice to engage in collective bargaining.

Texas and New Orleans Railroad Co. v. Brotherhood of Railway Clerks (281 U. S. 548), we submit, settled this issue. The decisions in the Schechter Corp. v. United States (295 U. S. 495, 79 L. ed. 1570), Morehead v. New York ex rel. Tipaldo (297 U. S. —, 80 L. ed. Adv. Ops. 721), and Carter v. Carter Coal Co. (80 L. ed. Adv. Ops. 746) also do not modify or change the rule laid down in the Texas and New Orleans case.

This Court has unconditionally recognized the right of employees to bargain collectively as one to be protected by Congress under the Fifth Amendment. The power to protect this constitutional right of employees must include the power to make that right an effective one, and the means required to furnish adequate protection must, of necessity, be left to the sound discretion of the legislature, and unless such means are patently violative of rights enjoyed by employers or others the statute must be given the benefit of the presumption of constitutionality afforded to all statutes of Congress.

> Buttfield v. Stranahan (192 U. S. 470);
> Dartmouth College v. Woodward (4 Wheat. 518);
> Life & Casualty Insurance Co. v. McCray (291 U. S. 566);
> Ogden v. Saunders (12 Wheat. 213).

The purpose of the National Labor Relations Act is proper. The means used to accomplish that purpose have a reasonable relation to the end sought to be accomplished. The purpose being proper, the means for its accomplishment are within the judgment of the Congress.

> "With the wisdom of the exercise of that judgment the Court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit

of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system."

Purity Extract Co. v. Lynch (226 U. S. 192, 201, 202);

Cf.: Carter v. Carter Coal Co. (80 L. ed. Adv. Ops. 749).

Congress adopted the National Labor Relations Act as a means to effectually protect the right of employees to collective bargaining. It gives the employees nothing to which they are not entitled under the Constitution. It protects rights already afforded them by the Constitution. It would be vain to say that the employees must be protected in their rights to collective bargaining but that Congress cannot make this protection effective.

> "It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, *it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective.*" Purity Extract Co. v. Lynch (226 U. S. 192, 201).

Congress found that without the provisions of the National Labor Relations Act employers denied to employees the right to organize and refused to engage in collective bargaining with them. These conditions, Congress found, resulted in industrial strife and interfered with the flow of commerce. It thus became necessary for Congress to make effective the constitutional right of the employees and this it did by the National Labor Relations Act. This action of Congress transcends no right of the employer. It takes from the employer no property. It denies to the employer no right to discharge an employee except where such discharge is for the purpose of defeating the right to collective bargaining. It fixes no hours of labor or wages. It interferes with no fundamental right of the employer and it does not infringe upon the freedom of the press or free-

dom of speech. It does not deny to the employer the right to make contracts with its employees but gives to the employees a power to bargain collectively with the employer—a necessary incident to the constitutional right of the employee to join an organization of his own choice without interference. Congress unquestionably has the power to place upon the employer such conditions as are necessary to protect the employees in their constitutional rights. In other words, if Congress finds that it must regulate the activities of the employers so as to give force to its power to protect employees it can not be said that such conditions imposed on the employer are beyond the power of Congress. To do so would in effect take from Congress its power to protect the employees.

> "When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive." St. Joseph Stock Yards Co. v. United States (80 L. ed. Adv. Ops. 679, 685.)

The exercise of restraint upon the employers is analogous to the prohibition of non-intoxicating liquors in order to make the administration of prohibition effective. The war power which gave Congress power to regulate the liquor traffic carried with it the power to prohibit the sale of *non-intoxicating liquor* even though the Tenth Amendment reserved that right to the States and there was a taking of property without compensation.

> "It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government." Purity Extract Co. v. Lynch (226 U. S. 192, 201, and cases cited therein.)
>
> Cf.: Hamilton v. Kentucky Distilleries Co. (251 U. S. 146, 156);
>
> Jacob Ruppert v. Caffey (251 U. S. 264).

The rule has been extended to a restriction of the "liberty of contract" of individuals where such restriction was necessary to protect contracts which the legislature deemed of great importance to the public. "Liberty of contract" is not an absolute right. It may be subject to invasion.

See Liberty Warehouse Co. v. Burley Tobacco G. Co-Op. M. A. (276 U. S. 71, 97), in which the Court stated:

> "The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. The question is whether the re-restrictions of the statute have reasonable relation to a proper purpose. Miller v. Wilson (236 U. S. 373, 380, 35 S. Ct. 342, 59 L. ed. 628, L. R. A. 1915F, 829); Lindsley v. Natural Carbonic Gas Co. (220 U. S. 61, 78, 31 S. Ct. 337, 55 L. ed. 369, Ann. Cas. 1912, C, 160.) • • •"

THE GUARANTEE OF FREEDOM OF SPEECH AND FREEDOM OF THE PRESS IS NOT ABRIDGED BY THE ACT.

The guarantee of freedom of speech and the freedom of the press afforded by the first amendment is cherished by this Union. It believes that guarantee vital to the preservation of our democratic form of Government. It is anxious to preserve that guarantee untrammeled by interference of any sort and if the Act involved in this case abridged the constitutional guarantee of freedom of speech and freedom of the press it would be among the first to seek the annulment of the Act, but a study of the National Labor Relations Act discloses that it does not infringe upon the first amendment in any particular.

Nowhere is there any requirement that the Associated Press employ anyone who does not have the qualifications necessary to carry out its news policy. The National Labor Relations Act does not limit or restrict the rights of the Associated Press to employ whomever it pleases and at such wages or conditions of labor as may be agreed upon between

it and the employees acting through representatives of their own choice.

It is fundamental that no citizen can claim immunity from laws general in scope merely because that citizen may be engaged in the dissemination of news. "Freedom of speech" and "free press" import no freedom from general obligations imposed upon citizens of all classes. This was pointed out in Grosjean v. American Press Company (80 L. ed. Adv. Ops. 459, 465), in which the court said:

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. * * *"

There is no relationship between the right of employees to free choice of association for purposes of collective bargaining and the guarantee of freedom of speech and the freedom of the press. We cannot take seriously petitioner's argument that "This freedom is seriously jeopardized by the provisions of the Labor Relations Act."

CONCLUSION.

We respectfully submit that the National Labor Relations Act as applied to the petitioner, the Associated Press, is not in violation of the Constitution and that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully,

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